

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES ANTHONY RALSTON,

Defendant-Appellant.

UNPUBLISHED
February 15, 2005

No. 250993
Genesee Circuit Court
LC No. 03-012072-FC

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of armed robbery, MCL 750.529, possession of a firearm during the commission of a felony (felony-firearm), MCL 720.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced as a fourth-felony habitual offender, MCL 769.12, to concurrent prison terms of forty to sixty years' imprisonment each for the robbery convictions and ten to twenty years' imprisonment for the felon-in-possession conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court abused its discretion by allowing the prosecutor to introduce evidence of his involvement in a separate offense, the robbery of Smitty's Market. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). In deciding whether evidence of other bad acts may be admitted under MRE 404(b), a trial court must decide: (1) whether the evidence is being offered for a proper purpose, not to show the defendant's propensity to act in conformance with a given character trait; (2) whether the evidence is relevant to an issue of fact of consequence at trial; (3) whether its probative value is substantially outweighed by the danger of unfair prejudice in light of the availability of other means of proof; and (4) whether a cautionary instruction is appropriate. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

The Smitty's Market robbery occurred the day after the offense in this case, the same three perpetrators were involved, and the same two vehicles were used. Additionally, all three perpetrators assumed similar roles in both offenses. During each offense, defendant was armed

with a gun, Jeremy Powell accompanied defendant and possessed a tool to assist in committing a robbery, and Herman Page acted as a lookout. We conclude that the evidence of the Smitty's Market robbery was material and probative of the identity and intent of the robbers in the present case and, therefore, was offered for a proper purpose under MRE 404(b). Furthermore, the trial court took steps to minimize any potential for unfair prejudice by precluding any mention that Smitty's Market was actually a gunshop and also precluding evidence that two people were shot and one killed during the robbery of Smitty's Market. With these precautions, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in allowing this evidence.

Defendant next argues that the trial court erred in scoring fifteen points for offense variable ("OV") 19 of the sentencing guidelines. Defendant challenged the scoring of OV 19 below on the basis that he had already been separately convicted and sentenced for the conduct that was used to score OV 19 and, therefore, that conduct could not be considered again for purposes of his sentencing in this case. He now argues that OV 19 was improperly scored where the scoring was based on conduct that was "neither contemporaneous nor one continuum of conduct with the charged offense." Because defendant did not object below on the same ground he now raises on appeal, this issue is unpreserved. Accordingly, our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

MCL 777.49(b) instructs that a court may score fifteen points for OV 19 if "[t]he offender used force or threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services." Under the legislative guidelines, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

In *People v Barbee*, 470 Mich 283, 285; 681 NW2d 348 (2004), the defendant gave the police a false name during a traffic stop, before officers administered a breathalyzer and determined that he was driving while intoxicated and that his license had been suspended. The Supreme Court held that the trial court properly assessed the defendant ten points under OV 19 for interfering with the administration of justice, even though the interference occurred before criminal charges were filed. *Id.* at 284, 288.

Similarly, in *People v Cook*, 254 Mich App 635, 637-638; 658 NW2d 184 (2003), the defendant was assessed ten points for OV 19 for attempting to flee from the police after shooting at his ex-girlfriend and her new boyfriend. This Court noted that, "[i]n drafting the sentencing guidelines scoring instructions, the Legislature could have expressly prohibited sentencing courts from considering facts pertinent to the calculation of the sentencing guidelines range for one offense from being also used to calculate the sentence guidelines range for another offense, but it did not do so." *Id.* at 641. "[W]here the Legislature has not precluded it, we find that where the crimes involved constitute one continuum of conduct, as here, it is logical and reasonable to consider the entirety of defendant's conduct in calculating the sentencing guideline range with respect to each offense." *Id.* at 641.

In the present case, defendant and his accomplices robbed Jerry's Party Store in Genesee County on October 28, 2002 and Smitty's Market in Lapeer County on October 29, 2002. On November 22, 2002, the police stopped defendant and an accomplice, who was driving defendant's van, in Isabella County. The accomplice and a passenger both had outstanding warrants and were arrested. However, defendant shot at the police officers and drove away. Defendant was later apprehended and arrested. We believe that defendant's attempt to elude capture can be considered part of the same continuum of conduct as the two robberies, even though it occurred a month later and, therefore, properly was scored in connection with the present offense. *Cook, supra*. Defendant shot at the police and fled, thereby using force in an attempt to interfere with the administration of justice. Therefore, defendant has not shown that the trial court committed a plain error in scoring fifteen points for OV 19.

Furthermore, defendant's minimum sentence of forty years (i.e., 480 months) would still be within defendant's enhanced minimum sentence range even if OV 19 had not been scored. Therefore, any scoring error does not affect defendant's substantial rights and is not grounds for resentencing.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen